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IN THE

Supreme Court of the United States

October Term, 1952

No. 202

STATE OF CALIFORNIA, CALIFORNIA POLYTECHNIC SCHOOL and CALIFORNIA STATE BOARD OF EQUALIZATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners, the State of California and two of its duly constituted agencies, California Polytechnic School and California State Board of Equalization, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on April 11, 1952. A timely petition for rehearing was denied on May 17, 1952. [R. 128.]

Opinions Below.

The only opinion below [R. 75-81] was rendered by the District Court for the Southern District of California, Central Division, and is reported at 96 Fed. Supp. 318. The Court of Appeals, in a *per curiam* opinion [R. 126], affirmed the judgment of the District Court for the reasons set forth in the opinion reported at 96 Fed. Supp. 318 [R. 126] and petitioners' timely petition for rehearing by the Court of Appeals was denied without opinion. [R. 128.]

Jurisdiction.

As set forth above, a timely petition for rehearing by the Court of Appeals was denied on May 17, 1952. [R. 128.] The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented.

1. May a State and some of its duly constituted agencies be made parties to proceedings brought by the United States in a District Court under Section 3678 of the Internal Revenue Code, Title 26, United States Code, to foreclose Federal tax liens upon property or rights to property owned by an individual whose failure to pay Federal tax liabilities has given rise to the Federal tax liens sought to be foreclosed?

2. Assuming, *arguendo,* that a State and some of its duly constituted agencies may properly be made parties to proceedings commenced by the United States under Section 3678 of the Internal Revenue Code, Title 26, United States Code, may the District Court by decree confer upon the United States rights against the State or its duly constituted officers and/or agencies superior

to the rights of the delinquent taxpayer against the State or its duly constituted officers or agencies?

3. Can the United States, by commencing proceedings under Section 3678 of the Internal Revenue Code, Title 26, United States Code, and by joining a State and some of its duly constituted agencies in those proceedings (assuming, *arguendo*, that a Federal District Court would have jurisdiction to entertain the action against the State and its agencies) destroy the well-established principle that a State may be sued by its citizens only with its consent and only in the manner provided for by State statute? In the instant case, as will be more fully discussed herein, the taxpayers who were delinquent in their payment of the Federal tax liability which gave rise to the Federal tax liens sought to be foreclosed in the proceedings below could not have recovered from the State of California or any of its duly constituted officers or agencies the sum upon which the District Court decreed the United States had a first and prior lien and which the District Court decreed should be "sold" and the proceeds of that sale distributed as provided for by Section 3678 of the Internal Revenue Code, Title 26, United States Code.

4. Does a Federal District Court have jurisdiction to decree foreclosure of Federal tax liens upon an unsegregated portion of the funds in the treasury of one of the States?

5. May a State and its duly constituted officers and agencies be said to have property or rights to property belonging to a delinquent taxpayer in their possession upon which Federal tax liens may be foreclosed by proceedings commenced under Section 3678 of the Internal Revenue Code, Title 26, United States Code, when the delinquent taxpayer's liability to the State under various

State taxing statutes exceeds the amount due from the State to the delinquent taxpayer under a leasing arrangement providing for the State's use of property owned by the delinquent taxpayer?

Statutes Involved.

Pertinent provisions of the Internal Revenue Code, Title 26, United States Code:

Section 3670.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Section 3678.

"(a) Filing. In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.

"(b) Parties to proceedings. All persons having liens upon or claiming any interest in the property or

rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court.

"(c) Adjudication and decree. The said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property and rights to property in question, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property and rights to property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

"(d) Receivership. In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Commissioner during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity."

Section 3797.

"(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

"(1) Person. The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, company, or corporation.

* * * * * * * *

"(10) State. The word 'State' shall be construed to include the Territories and the District of Colum-

bia, where such construction is necessary to carry out provisions of this title."

Pertinent provisions of the California Unemployment Insurance Act:

Section 39(a).

"(a) . . . After December 31, 1940, employers shall pay into the Unemployment Fund contributions upon all wages with respect to which contributions become due and payable for employment subject to this act at rates as provided in this section. . . ."

Section 45.1.

"The employer and worker contributions, interest and penalties required under this act shall be collectible by civil action against the defaulting employer, in addition to any other procedures prescribed by this act. At any time within three years after any amount shown to be due in a return filed by an employing unit or any assessment made by the commission becomes delinquent or within three years after the first recording of an abstract under Section 45.9 or of a certificate under Section 45.10, the commission may bring an action in the courts of this State, of any other State, or of the United States in the name of the people of the State of California to collect the amount delinquent together with penalties and interest.

"In any civil action brought by or against the commission, all of the courts of this State shall give preference to such action on their calendar over all civil litigation except equity cases, cases involving extraordinary writs, or summary proceedings. In any such action a certificate attested to by the commission or its duly authorized agent showing the delinquency shall be *prima facie* evidence of the pay-

ment by the employing unit of the amount of wages for employment by employers set forth therein; of the levy of the contributions; of the delinquency; and of the compliance by the commission with all the provisions of this act in relation to the computation and levy of the contributions specified in such certificate."

Section 45.8.

"(a) If any person or employing unit is delinquent in the payment of any contributions, penalties or interest provided for in this act, the director may, not later than three years after the payment became delinquent or within five years of the last recording of an abstract under Section 45.9 or of a certificate under Section 45.10, give notice of the amount of such delinquency by registered mail, to all persons having in their possession or under their control any credits or other personal property belonging to such delinquent person or employing unit, or owing any debts to such person or employing unit at the time of the receipt of the registered notice. Any person so notified shall neither transfer nor make any disposition of such credits or other personal property or debts until the director shall have consented to a transfer or disposition, or until 45 days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice, advise the director of any and all such credits, other personal property or debts, in their possession, under their control, or owing by them, as the case may be.

"(b) If, during the effective period of the notice to withhold, any person so notified makes any transfer or disposition of the credits or personal property required to be withheld hereunder, he shall be per-

sonally liable to the department for any loss sustained by reason of his failure to so withhold. Such liability shall not exceed the actual value of any such credits, debts or other personal property under his control or in his possession.

"(c) Person as used in this section includes this State, any county, city and county, municipality, district or other political subdivision thereof.

"(d) In case of the State, the notice shall be given to the state department, board, office or commission prior to the time it presents the claim of such person or employing unit to the State Controller."

Section 45.9.

"(a) If any employing unit is delinquent in the payment of any contributions, penalties or interest provided for in this act, the commission may, not later than three years after the payment became delinquent or within three years of the first recording of an abstract under this section or of a certificate under Section 45.10, file in the office of the county clerk of Sacramento County, or with the county clerk of the county in which the employer has his principal place of business, a certificate specifying the amount of the contributions, interest and penalty due, the name and last known address of the employer liable for the same, that the commission has complied with all the provisions of this act in relation to the computation and levy of the contributions, interest and penalty, and a request that judgment be entered against the employer in the amount of the contributions, interest and penalty set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the commission against the employer in the amount

of the contributions, interest, and penalty set forth in the certificate. Such judgment may be filed by the county clerk in a loose-leaf book entitled 'unemployment contributions judgments.'

"(b) An abstract of such judgment or a copy thereof may be recorded with the county recorder of any county and from the time of such recording, the amount of the contributions, interest and penalty therein set forth shall constitute a lien upon all the property of the employer in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien. Execution shall issue upon such a judgment upon request of the commission in the same manner as execution may issue upon other judgments and sales shall be held under such execution as prescribed in the Code of Civil Procedure. In all proceedings under this section the commission or its authorized agents shall be empowered to act on behalf of the people of the State of California.

"(c) It is expressly provided that the foregoing remedy of the commission shall be cumulative and that no action taken by the commission shall be or be construed to be an election on the part of the commission to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act.

"(d) Prior to the filing by the commission of the certificate provided for in this section, the delinquent employer shall be given an opportunity for oral hearing before the appeals board or its duly authorized representative. Notice of the time and place of such hearing must be mailed at least 15 days in advance thereof, and may be sent by registered mail address to the last known address of the delinquent employer.

In the event the delinquent employer or his representative does not appear at such hearing or if an appearance is made but the delinquent employer does not establish to the satisfaction of the appeals board or its duly authorized representative that the amount of contributions, interest and penalties claimed to be due is erroneous, the commission may proceed forthwith to file the certificate provided for in this section. The hearing provided in this section shall not be required before the filing by the commission of a certificate in the event the employer has previously been afforded a full hearing before the appeals board; the employer may however file an affidavit setting forth new and additional evidence, to establish that the contributions, interest and penalties sought to be collected are erroneous, and the appeals board may grant an additional hearing as provided in this section."

Section 45.10.

"(a) If an employing unit is delinquent in a payment of any contributions, penalties or interest provided for in this act, the director may, not later than three years after the payment became delinquent, or within five years after the last entry of a judgment under Section 45.9, file for record in the office of any county recorder a certificate specifying the amount of contributions, interest and penalties due, the name and address as it appears on the records of the department of the employing unit liable for the same and the fact that the department has complied with all provisions of this act in the determination of the amount required to be paid. From the time of the filing for record, the amount required to be paid together with interest and penalty constitutes a lien upon all real property in the county

owned by the person or afterwards and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and shall continue for five years from the time of the filing of the certificate unless sooner released or otherwise discharged. The lien may, within five years from the date of the filing of the certificate or within five years from the date of the last extention of the lien in the manner herein provided, be extended by filing for record a new certificate in the office of the county recorder of any county and from the time of such filing the lien shall be extended to the real property in such county for five years unless sooner released or otherwise discharged.

"(b) If any amount required to be paid under this act is not paid when due, the director or his authorized representative may, not later than three years after the payment became delinquent, or within five years after the last entry of a judgment under Section 45.9 or filing for record of a certificate under this section, issue a warrant for the enforcement of any liens and for the collection of any amount required to be paid to the State under this act. The warrant shall be directed to any sheriff, marshal or constable and shall have the same effect as a writ of execution. The warrant shall be levied and sale made pursuant to it in the same manner and with the same effect as a levy of and a sale pursuant to a writ of execution. The department may pay or advance to the sheriff, marshal or constable, the same fees, commissions, and expenses for his services as are provided by law for similar services pursuant to a writ of execution. The director, and not the court, shall approve the fees for publication in a newspaper. The fees, commissions, and expenses are the obligation of the person or employing unit

required to pay any amount under this act and may be collected from him by virtue of the warrant or in any other manner provided in this act for the collection of the tax."

Pertinent provisions of the California Sales and Use Tax Law, California Revenue and Taxation Code:

Section 6051.

"For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter."

Section 6711.

"At any time within three years after any tax or any amount of tax required to be collected becomes due and payable and at any time within three years after the delinquency of any tax or any amount of tax required to be collected, or within three years after the last recording of an abstract under Section 6738 or of a certificate under Section 6757, the board may bring an action in the courts of this State, of any other state, or of the United States in the name of the people of the State of California to collect the amount delinquent together with penalties and interest."

Section 6736.

"If any amount required to be paid to the State under this part is not paid when due, the board may

within three years after the amount is due file in the office of the county clerk of Sacramento County, or any county, a certificate specifying the amount required to be paid, interest and penalty due, the name and address as it appears on the record of the board of the person liable, the compliance of the board with this part in relation to the determination of the amount required to be paid, and a request that judgment be entered against the person in the amount required to be paid, together with interest and penalty as set forth in the certificate."

Section 6757.

"If any amount required to be paid to the State under this part is not paid when due, the board may within three years after the amount is due file for record in the office of any county recorder a certificate specifying the amount, interest, and penalty due, the name and address as it appears on the records of the board of the person liable for the same, and the fact that the board has complied with all provisions of this part in the determination of the amount required to be paid. From the time of the filing for record, the amount required to be paid together with interest and penalty constitutes a lien upon all real property in the county owned by the person or afterwards and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and shall continue for five years from the time of the filing of the certificate unless sooner released or otherwise discharged. The lien may, within five years from the date of the filing of the certificate or within five years from the date of the last extension of the lien in the manner herein provided, be extended by filing for record a new certificate in the office of

the county recorder of any county and from the time of such filing the lien shall be extended to the real property in such county for five years unless sooner released or otherwise discharged."

Section 6776.

"At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, or within three years after the last recording of an abstract under Section 6738 or of a certificate under Section 6757, the board or its authorized representative may issue a warrant for the enforcement of any liens and for the collection of any amount required to be paid to the State under this part. The warrant shall be directed to any sheriff, marshal or constable and shall have the same effect as a writ of execution. The warrant shall be levied and sale made pursuant to it in the same manner and with the same effect as a levy of and a sale pursuant to a writ of execution."

Section 6827.

"The remedies of the State provided for in this chapter are cumulative, and no action taken by the board or Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this part."

Pertinent provisions of the California Code of Civil Procedure:

Section 710.

"(a) Whenever a judgment for the payment of money is rendered by any court of this State against a defendant to whom money is owing and unpaid by this State or by any county, city and county, city

or municipality, quasi municipality or public corporation, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

"1. If such money, wages or salary is owing and unpaid by this State to such judgment debtor, said judgment creditor shall file said abstract or transcript and affidavit with the State department, board, office or commission owing such money, wages or salary to said judgment debtor prior to the time such State department, board, office or commission presents the claim of such judgment debtor therefor to the State Controller or to the State Personnel Board. Said State department, board, office or commission in presenting such claim of such judgment debtor to said State Controller shall note thereunder the fact that [of] the filing of such abstract or transcript and affidavit and state the amount unpaid on said judgment as shown by said affidavit and shall also note any amounts advanced to the judgment debtor by, or which the judgment debtor owes to, the State of California by reason of advances for expenses or for any other purpose. Thereupon the State Controller, to discharge such claim of such judgment debtor, shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due such judgment debtor on such claim, after deducting from such claim an amount sufficient to reimburse the State department, board, officer or commission for any amounts advanced to said judgment debtor or by him owed to the State of California, as will satisfy in full or to the greatest extent the amount unpaid

on said judgment and the balance thereof, if any, to the judgment debtor.

"2. If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

"(b) The judgment creditor upon filing such abstract or transcript and affidavit shall pay a fee of one dollar to the person or agency with whom the same is filed.

"(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor.

"(d) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are owing by reason of an award made in a condemnation proceeding brought by the governmental agency, such governmental agency may pay the amount of the award to the clerk of the court in which such condemnation proceeding was tried, and shall file therewith the abstract or transcript

of judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of section 1251 of this code. Upon such payment into court and the filing with the county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in said award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to said award. At said time and place the court shall make such determination and order the distribution of the money held by the county clerk in accordance therewith.

"(e) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word 'office' as used herein does not include any branch or subordinate office located in a different city.

"(f) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any wages, or salary owing to any elective officer of this State whose salary is fixed by section 19 of Article V of the State Constitution."

Pertinent provisions of the California Constitution:

Article XX, Section 6.

"Suits may be brought against the State in such manner and in such courts as shall be directed by law."

Statement.

The factual situation involved is not a complicated one. It is not disputed that, as alleged in the complaint, certain individuals herein referred to as "taxpayers" are indebted to respondent, the United States of America, under Federal taxing statutes. Nor is it disputed that liens in favor of respondent and against taxpayers arose as is alleged in the complaint. Briefly summarized, the pertinent Federal liens against taxpayers are as follows:

1. A lien in the sum of $16,656.37 which came into existence on March 23, 1945, by virtue of the Collector's receipt of an assessment list carrying an assessment in said sum against one of the taxpayers. [R. 10.] This lien was not recorded until August 10, 1946, at which time it was recorded in the office of the County Recorder of Alameda County. The lien was additionally recorded in San Luis Obispo County on May 22, 1947. [See, also, R. 12-13 for a parallel assessment against another of the taxpayers.]

2. A lien in the sum of $17,552.56 which came into existence on August 19, 1946, by virtue of the Collector's receipt of an assessment list carrying an assessment in said sum against taxpayers. [R. 14.] This lien was not recorded until December 6, 1946, at which time it was recorded in the office of the County Recorder of Alameda County. The lien was additionally recorded in San Luis Obispo County on January 15, 1947.

3. Liens in a sum exceeding $500,000 which came into existence on December 6, 1946, and January 9, 1947, by virtue of the Collector's receipt of assessment lists on those dates, carrying assessments

in said sum against taxpayers. The first of these liens in an amount exceeding $500,000 was recorded on December 9, 1946, in Alameda County and on January 15, 1947, in San Luis Obispo County.

4. A lien in the sum of $12,948.53 which came into existence on November 25, 1946, by virtue of the Collector's receipt of an assessment list carrying an assessment in said sum against taxpayers. [R. 20.] This lien was recorded on January 15, 1947, in Alameda and San Luis Obispo Counties. [R. 21.]

The dispute which exists between petitioners and respondent stems from the fact that on July 1, 1946, as alleged in the complaint, taxpayers leased certain real and personal property located in San Luis Obispo County to the State of California [R. 9] and that as of June 30, 1948, the rental payments earned and unpaid under said leasing arrangement amounted to $3,587.51. [R. 92.] Respondent, however, made no showing that taxpayers could have recovered said sum from petitioners, and argued that it was immaterial that taxpayers were and are indebted to the State of California under California taxing statutes for the following items:

1. A liability under the California Sales and Use Tax Law in the sum of $361.07 for the taxable period January 1, 1945, to June 30, 1946, as evidenced by a Notice of Determination issued under that law on February 4, 1948, by the California State Board of Equalization (the agency of the State of California duly charged with the administration and enforcement of said taxing statute). [Finding XXVIII, R. 93.]

2. An additional liability under the California Sales and Use Tax Law in the sum of $1,302.77 for

the taxable period July 1, 1946, to May 15, 1947, as evidenced by a Notice of Determination by the California State Board of Equalization dated December 15, 1947. [Finding XXIX, R. 93.]

3. A liability under the California Sales and Use Tax Law in the sum of $2,559.13 for the taxable period March 1, 1947, to November 30, 1947, as evidenced by a Notice of Determination by the California State Board of Equalization dated January 12, 1948. [Finding XXXI, R. 93.]

4. A liability under the California Unemployment Insurance Act in the sum of $9,199.90 for the taxable period April 1, 1946, to March 31, 1947, as evidenced by a Certificate of the Chief Accounting Officer of the California Department of Employment dated November 6, 1950. [R. 40, 51-62, 94.]

5. A liability under the California Unemployment Insurance Act in the sum of $520.94 for the taxable period December 31, 1946, to August 6, 1947, as evidenced by a Certificate of the Chief Accounting Officer of the California Department of Employment dated November 6, 1950. [R. 40, 41, 63-74, 94.]

It was respondent's position in the District Court that the Federal liens described above attached to the general funds in the treasury of the State of California to the extent of the amount due and unpaid under the State's leasing arrangement with the taxpayers; that the State of California and the two State agencies (also petitioners herein) could be made parties to proceedings brought by respondent under Section 3678 of the Internal Revenue Code, Title 26, United States Code, to foreclose the

Federal liens upon those funds; and that the State of California could not offset against the rentals due under the State's leasing arrangement with the taxpayers the above described State tax liabilities.

Petitioners contended in the District Court that they could not be made parties to proceedings brought by the United States under Section 3678 of the Internal Revenue Code, Title 26, United States Code, and that the District Court, accordingly, lacked jurisdiction to entertain the action against the State of California in the absence of other statutory provision authorizing the same. Petitioners' objections to the District Court's jurisdiction were raised by way of a motion to dismiss the complaint and quash service of summons [R. 26-28] which was denied by a minute order of the District Court dated August 3, 1949. [R. 29.]

The answer filed by petitioners [R. 29-38] restated petitioners' foregoing objections and alleged additionally:

1. That petitioners did not hold, and do not now hold, property belonging to taxpayers or in which said taxpayers have any right, title or interest, subject to tax lien or levy under the provisions of Sections 3670 and 3692 of the Internal Revenue Code.

2. That petitioners are not "persons" within the purview of Section 3678 of the Internal Revenue Code and, accordingly, not proper parties to foreclosure proceedings commenced under that section.

3. That, in any event, petitioners are entitled to offset taxpayers' outstanding State tax liabilities against rentals accrued under the aforesaid leasing arrangement.

Specification of Errors to Be Urged.

The Court of Appeals erred:

1. In adopting the District Court's holding that the State of California and its duly constituted agencies are "persons" within the purview of Section 3678 of the Internal Revenue Act, Title 26, United States Code.

2. In adopting the District Court's holding that petitioners, State of California and its duly constituted agencies, hold property belonging to the delinquent taxpayers.

3. In adopting the holding of the District Court that the State of California could not offset taxes owing to it by the taxpayers against the rentals owed to the taxpayers by the State of California by virtue of the aforementioned leasing arrangement.

4. In holding that the State of California's tax collection procedures and remedies are not cumulative. (See Section 45.9(c) of the California Unemployment Insurance Act and Section 6827 of the California Sales and Use Tax Law, *supra.*)

Reasons for Granting the Writ.

1. The Court of Appeals, in adopting the decision of the District Court, disregarded completely the relationship between the delinquent taxpayers and the State of California. In California, as is the case in all states of the Union, State taxing statutes provide various collection methods and procedures, and other statutes provide methods and procedures whereby citizens of a State may enforce collection of amounts due and owing from the State. It is a fundamental principle that a State may not be sued without its consent and any individual engaging in a business transaction with a State does so with full knowledge of the fact that he must look to State statutes for methods and procedures to enforce any grievance he may have if the transaction turns out unfavorably. It is necessarily true, in view of the well recognized principle that a State may be sued only with its consent and in the manner it provides, that the nature of the rights created by a contract between a State and one of its citizens must be viewed in the light of the statutes prescribing the manner in which those rights might be enforced.

The Court of Appeals, in ignoring entirely respondent's failure to establish that the delinquent taxpayers could have enforced collection of any amount from petitioners, has in effect held that a Federal tax lien may attach to, and be foreclosed upon, the amount of an asserted indebtedness owing from a State even though it be a fact under State law, as is the case here, that collection of the indebtedness by the taxpayers could not have been accomplished.

2. The Court of Appeals failed to give recognition to the well-established principle of *expressio unius est exclusio alterius*. As was pointed out to the District Court and to the Court of Appeals, Section 3678 of the Internal Revenue Code, Title 26, United States Code, provides only that "persons" of a certain description may be joined as parties to proceedings brought under that section. No mention is made of sovereign states in Section 3678 of the Internal Revenue Code, Title 26, United States Code, and Section 3797 of Title 26 must necessarily be referred to for a definition of the term "persons" as used in Section 3678. Reference to Section 3797 (see statutes involved, *supra*) discloses that the term "person" is defined in subdivision 1 of subsection (a), whereas the term "state" is defined in subdivision 10 of subsection (a). The definition of "person" in subdivision 1 of subsection (a) makes no reference to states or territories, whereas the separate definition of the term "state" specifically includes territories as well as the District of Columbia.

In holding that the term "persons" as contained in Section 3678 of the Internal Revenue Code, Title 26, United States Code, also includes sovereign states, the Court of Appeals has ignored not only the rule of *expressio unius est exclusio alterius* but also the well-recognized principle that considerations of comity and the ordinary respect due other sovereigns require a court to hold that a sovereign is not deemed included within a general term such as "persons" unless the term is so

specifically defined or unless the inclusion was necessarily intended.

It is submitted that the definitions of "person" and "state" in Section 3797 of the Internal Revenue Code, Title 26, United States Code, clearly express the congressional intent not to include the sovereign states of the Union and their duly constituted agencies within the scope of those who may properly be made parties to foreclosure proceedings under Section 3678.

3. It is not essential to the effective application of Section 3678 of the Internal Revenue Code, Title 26, United States Code, to hold that states and their duly constituted agencies may be made parties to proceedings brought under that section. To the contrary, the effective application of Section 3678 of the Internal Revenue Code, Title 26, United States Code, would best be assured if the United States were restricted to foreclosing its liens upon any cause of action that a delinquent taxpayer might have against a State or one of its duly constituted agencies.

If liens upon a delinquent taxpayer's cause of action were to be foreclosed, it necessarily follows that a purchaser of that cause of action upon foreclosure sale would obtain all the property or enforceable rights to property possessed by the delinquent taxpayer at the time the Federal tax lien attached. Compliance with all pertinent State constitutional and statutory provisions would be assured and all questions relating to the applica-

tion of State provisions would be decided by the courts that should be burdened with that task, namely, the State courts.

4. If petitioners' right to an equitable setoff be conceded, as the decision of the District Court adopted by the Court of Appeals purported to do, equitable consideration should truly govern, including due regard for a state's revenue and social security provisions. Further, in considering whether a State may assert an equitable setoff against a delinquent taxpayer, the nature of the delinquent taxpayer's cause of action against the State must be considered as well as the possibility of the reduction of that cause of action to an enforceable money judgment.

5. Basically, the important issue presented by the within petition is whether, in the enforcement of the Federal taxing provisions, due regard should be given to the only property laws we know, namely, state property laws, in determining the character and extent of property and rights to property available to the Federal government in proceedings designed to enforce payment of Federal tax liabilities.

6. Settlement of the questions presented is of great importance in the administration of Federal and State taxing statutes inasmuch as the steadily increasing "competition" between Federal and State taxing agencies in the tax collection field should be conducted in accordance with clearly defined rules and in the spirit of comity rather than under the burden of vexatious litigation.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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